Appeal Nos. 14-1108, -1109
(Reexamination No. 95/001,369)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Skullcandy, Inc.,

Appellant,

v.

CSR, plc,

Cross-Appellant.

Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board

CONSENT MOTION TO CONSOLIDATE APPEAL NOS. 14-1108 AND 14-1109 WITH APPEAL NO. 14-1138

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CERTIFICATE OF INTEREST

The undersigned counsel certifies the following:

1. The full name of every party represented by the undersigned is:

Skullcandy, Inc.

2. The real party in interest represented by the undersigned is:

Skullcandy, Inc.

3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party now represented by the undersigned in the trial court or agency or are expected to appear in this court are:

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DATED: December 9, 2013

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MOTION

With the consent of appellee CSR, plc ("CSR"), appellant Skullcandy, Inc. ("Skullcandy") hereby moves to consolidate Appeal Nos. 14-1108 and 14-1109 (already consolidated with each other) with Appeal No. 14-1138. In particular, Skullcandy moves the Court to consolidate these appeals so that (1) CSR files a "principal brief" addressing CSR's two appeals [Appeal No. 14-1138 and Appeal No. 14-1109] in accordance with the current schedule for filing briefs in Appeal No. 14-1138; (2) Skullcandy then files a "principal and response brief" addressing its appeal [Appeal No. 14-1108] and responding to CSR's appeals; (3) CSR then files a "response and reply brief" that responds to Skullcandy's appeal and replies to Skullcandy's response to CSR's appeals; and (4) Skullcandy then files a "reply brief" that replies to CSR's response to Skullcandy's appeal. This would follow the pattern of briefing outlined in Fed.R.App.P. 28.1, with CSR's two appeals [Appeal Nos. 14-1138 and 14-1109] effectively serving as "the appeal" and Skullcandy's appeal [Appeal No. 14-1108] serving as "the cross-appeal." CSR would act as "appellant" for purposes of preparing the appendix for the consolidated appeals.

Pursuant to Fed.Cir.R. 27(a)(5), counsel for Skullcandy states that counsel for CSR has reviewed this motion, and CSR's counsel has stated that CSR agrees with the relief sought in this motion.

BACKGROUND AND BASIS FOR MOTION

Skullcandy is the owner of U.S. Patent No. 7,187,948 ("the '948 patent") and U.S. Patent No. 7,395,090 ("the '090 patent"). The '090 patent is a continuation of the '948 patent and contains the same disclosure as the '948 patent. In 2010, CSR filed requests for *inter partes* reexamination with the U.S. Patent and Trademark Office ("the PTO") for both the '948 and the '090 patents. The PTO assigned Reexamination Serial No. 95/001,305 to the reexamination of the '948 patent and Reexamination Serial No. 95/001,369 to the reexamination of the '090 patent. The same examiner was assigned to both reexaminations, and the examiner eventually concluded that all existing and newly proposed claims of the '948 and '090 patent were patentable. In 2011, CSR appealed in both reexaminations to the Board of Patent Appeals and Interferences.

The Board[1] heard consolidated oral argument in both reexaminations on January 23, 2013, and issued its decisions in the reexaminations one day apart from each other on February 20 and 21, 2013. The parties then petitioned for reconsideration, and the Board issued its decisions on those petitions in both reexaminations on August 8, 2013. The Board held that the existing and newly

[1] On September 16, 2012, the name of the Board of Patent Appeals and Interferences ("the BPAI") was changed to the Patent Trial and Appeal Board ("the PTAB"). Because this name change has no effect on this motion, use of the term "the Board" will refer to both the BPAI and the PTAB, as the context may indicate.

proposed claims for the ’948 patent were patentable, but held that all of the existing and newly proposed claims of the ’090 patent except for claim 5 were unpatentable. The Board’s decisions in both reexaminations rely on and extensively discuss the disclosure of GB 2357663A (“the Smith reference”). The Smoith reference serves as CSR’s primary prior art reference in both reexaminations.

CSR filed a notice of appeal from the Board’s decision on the ’948 patent in Reexamination No. 95/001,305 on October 7, 2013. This Court has now docketed that appeal as Appeal No. 14-1138. In response, Skullcandy then filed what it termed a “notice of cross appeal” from the Board’s decision on the ’090 patent in Reexamination No. 95/001,369. This Court has now docketed that appeal as Appeal No. 14-1108. And finally, CSR filed a cross-appeal from the Board’s decision on the ’090 patent in Reexamination No. 95/001,369 on October 21, 2013. This Court has now docketed that appeal as Appeal No. 14-1109.

This Court consolidated Appeal Nos. 14-1108 and 14-1109 on its own initiative, but has not consolidated those appeals with Appeal No. 14-1138. Skullcandy, with CSR’s consent, now moves to consolidate Appeal Nos. 14-1108 and 14-1109 with Appeal No. 14-1138.

In particular, Skullcandy moves the Court to consolidate these appeals so that (1) CSR files a “principal brief” addressing CSR’s two appeals [Appeal No. 14-1138 and Appeal No. 14-1109] in accordance with the current schedule for

filing briefs in Appeal No. 14-1138;[2] (2) Skullcandy then files a "principal and response brief" addressing its appeal [Appeal No. 14-1108] and responding to CSR's appeals; (3) CSR then files a "response and reply brief" that responds to Skullcandy's appeal and replies to Skullcandy's response to CSR's appeals; and (4) Skullcandy then files a "reply brief" that replies to CSR's response to Skullcandy's appeal. This would follow the pattern of briefing outlined in Fed.R.App.P. 28.1, with CSR's two appeals [Appeal Nos. 14-1138 and 14-1109] effectively serving as "the appeal" and Skullcandy's appeal [Appeal No. 14-1108] serving as "the cross-appeal." CSR would act as "appellant" for purposes of preparing the appendix for the consolidated appeals.[3] The parties anticipate that the Court would hear oral argument on all appeals at the same time.

There are several good reasons to consolidate in this manner: (1) the disclosure of the two patents at issue are the same; (2) the principal prior art Smith reference asserted against both patents is the same; (3) the two reexaminations were argued together at the Board; and (4) consolidation would reduce the total number of briefs filed with this Court from 7 to 4 and the number of sets of

[2] Since Appeal No. 14-1138 was docketed on December 5, 2013, CSR's principal brief in the consolidated appeals would be due on February 3, 2014. Fed.Cir.R. 31(a)(1)(B).

[3] The parties have agreed that the due date for CSR to designate materials for the appendix in the consolidated appeals will be 14 days after docketing of Appeal No. 14-1138, *i.e.*, December 18, 2013.

appendices from 2 to 1. It makes sense for CSR to file the first brief and to act as "the appellant" for purposes of the consolidated appeals because CSR filed the first notice of appeal. CSR has agreed with this proposal for consolidation.

As suggested in the CM/ECF User Guide, a motion corresponding to this motion is also being concurrently filed in Appeal No. 14-1138.

REQUEST FOR RELIEF

For all of the foregoing reasons, Skullcandy moves the Court for an order consolidating Appeal Nos. 14-1108 and 14-1109 with Appeal No. 14-1138 as outlined above. A proposed order is submitted herewith.

Respectfully submitted,

/s/ David R. Todd

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DATED: December 9, 2013

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[PROPOSED] **ORDER GRANTING MOTION TO CONSOLIDATE APPEAL NOS. 14-1108 AND 14-1109 WITH APPEAL NO. 14-1138**

Upon consideration of Skullcandy's motion to consolidate and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

(1) Appeal Nos. 14-1108 and 14-1109 are hereby consolidated with Appeal No. 14-1138. Appeal No. 14-1138 is hereby designated as the lead appeal.

(2) The briefing for the consolidated appeals will proceed in accordance with Fed.R.App. 28.1, and the schedule for briefing for the consolidated appeals will proceed in accordance with the briefing schedule for Appeal No. 14-1138 pursuant to Fed.Cir.R. 31(a). Specifically, the following briefs may be filed:

a. A "principal brief" by CSR addressing CSR's two appeals [Appeal No. 14-1138 and Appeal No. 14-1109], due within 60 days of docketing of Appeal No. 14-1138;

b. A "principal and response brief" by Skullcandy addressing its appeal [Appeal No. 14-1108] and responding to CSR's appeals;

c. A "response and reply brief" by CSR that responds to Skullcandy's appeal and replies to Skullcandy's response to CSR's appeals; and

d. A "reply brief" by Skullcandy that replies to CSR's response to Skullcandy's appeal.

(3) CSR shall act as "appellant" for purposes of preparing the appendix for the consolidated appeals pursuant to Fed.Cir.R. 30.

Date:_____ _____

FOR THE COURT

Service List:
Brent P. Lorimer
Jeffrey E. Ostrow

CERTIFICATE OF SERVICE

I certify that on this 9th day of December 2013, I caused the foregoing CONSENT MOTION TO CONSOLIDATE APPEAL NOS. 14-1108 AND 14-1109 WITH APPEAL NO. 14-1138 (and accompanying proposed order) to be filed with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will accomplish service by e-mail on the following:

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